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IN THE

Supreme Court of the United States

October Term, 1940

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WM. C. BACHELDER,
Receiver for Hoosier Veneer Company,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 261

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, WITH SUPPORTING BRIEF

H. K. BACHELDER,
W. C. BACHELDER,
FRANK P. BAKER,
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INDEX OF BRIEF

	Page
Jurisdiction	22
Statement of Case	22
Specification of Errors	27
Argument	28-54
1.	28
2.	30
3.	32
4.	34
5.	36
6.	37
7.	38
8.	39
9.	42
10.	43
11.	44
12.	48
13.	49
14.	50
15	53
16.	54

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TABLE OF CASES

Page

Amalgamated Workers v. Consolidated Edison Co., 309 U. S. 261 ---- 33

American Surety Co. v. Baldwin, 287 U. S. 156---34, 35, 50

Burke v. Morphy, et al., 109 Fed. (2) 572---- 34

Caminetti v. U. S., 242 U. S. 470---- 30

Ex Parte Tyler, 149 U. S. 163---- 36

Grand Int. Brotherhood v. Morphy, 109 Fed. (2) 576--34, 35

Hopkins v. U. S., 246 U. S. 655---- 33

H. P. Welch v. New Hampshire, 306 U. S. 79---- 35

Lion Bonding and Surety Co. v. Karatz, 262 U. S. 77---- 32

McNulta v. Lockridge, 141 U. S. 329---- 33

National Labor Relations Board v. Carlisle Lumber Co., 99 Fed. (2) 533 ---- 44

National Labor Relations Board v. Express Publishing Co., 85 Law Ed. 614---- 28

National Labor Relations Board v. National Casket Co., 107 Fed. (2) 992 ---- 52

National Labor Relations Board v. Riverside Mfg. Co., 119 Fed. (2) 302 ---- 47

Scott v. Western Pacific R. R., 246 Fed. 545---- 35

U. S. v. Congress Construction Co., 222 U. S. 199---- 33

U. S. v. Federal Surety Co., 72 Fed. (2) 961---- 33

U. S. v. Illinois Surety Co., 238 Fed. 840---- 33

STATUTES CITED

National Labor Relations Act----30, 31, 40

Railway Labor Act ----31, 33

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To the Honorable Charles Evans Hughes, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays that a writ of certiorari issue to review the judgment entered March 13, 1941, in the Seventh Circuit Court of Appeals, upon which judgment re-hearing was denied, April 14, 1941. Said judgment was rendered upon the petition of the National Labor Relations Board for the enforcement of the Board's order against this petitioner, entered on March 22, 1940. The record in this case as printed for the use of the Court below,

together with such additions as are necessary to show the proceedings of the Circuit Court of Appeals, are filed herewith in accordance with the rules of this Court.

Your petitioner respectfully shows:

I.

STATEMENT.

In 1933, the Circuit Court of Marion County, Indiana, appointed Frank F. Woolling, receiver for the Hoosier Veneer Company. In September, 1938, the Labor Board brought a proceeding against Frank F. Woolling, receiver for the Hoosier Veneer Company, and the Hoosier Veneer Company, charging unfair labor practices on or before November 15, 1937.

This matter came to hearing before Trial Examiner, October 6, 1938. The Trial Examiner filed an intermediate report on December 15, 1938. Frank F. Woolling died in January, 1939. This petitioner was appointed receiver by said Marion Circuit Court, on January 17, 1939. The Labor Board, by supplemental complaint, substituted this petitioner for Frank F. Woolling, receiver, but no further evidence was introduced, except to show that one of the employees had returned to work.

Both Frank F. Woolling, receiver, and Wm. C. Bachelder, receiver, filed special appearance to contest the jurisdiction, and neither of them otherwise appeared. The Board on March 22, 1940, found that this petitioner was guilty of unfair labor practices, and ordered him to cease and desist from refusing to bargain collectively with United Veneer and Lumber Workers, Local Industrial Union, No. 607, and

from discouraging membership in said union, and from interfering with, restraining, and coercing its employees in the exercise of their rights to self-organization.

The order further required this petitioner to take affirmative action upon request to bargain collectively with said union, to offer certain employees full re-instatement, and to make whole certain employees for any loss of back pay.

The Hoosier Veneer Company, in its corporate capacity, had appeared and introduced evidence. The Board found that the corporation was not engaged in any activities and was not guilty of any violations of the Act.

The Labor Board brought proceedings in the Seventh Circuit Court of Appeals against this petitioner for the enforcement of said order. Petitioner presented his objection to the jurisdiction of the Court, by a motion to dismiss, which was overruled. The Court's opinion allowed the petition for enforcement, except a direction that certain sums be paid to certain specified government agencies. No consent was ever obtained from the Marion Circuit Court for the prosecution of this action, either before the Labor Board or in the Circuit Court of Appeals. No evidence was produced to show that anything was ever said or done by this petitioner, either before or after his appointment, with reference to the charges in this proceeding.

II.

JURISDICTIONAL STATEMENT.

This is a petition for a writ of certiorari to the Seventh Circuit Court of Appeals under the authority granted by 28 U. S. C. A. 347.

The decree sought to be reviewed was in response to a petition brought by the National Labor Relations Board under the provisions of the National Labor Relations Act, giving Circuit Courts of Appeal jurisdiction to enforce orders of the Board. 29 U. S. C. A. 160e.

The Circuit Court rendered its opinion enforcing the board's order March 13, 1941. Petition for rehearing was denied April 14, 1941.

The opinion of the Circuit Court of Appeals is as follows:

Before EVANS and KERNER, *Circuit Judges*, and LINDLEY, *District Judge*.

KERNER, *Circuit Judge*. This case is before us upon the petition of the National Labor Relations Board for a decree of enforcement of the Board's order, based upon findings of fact and issued against the respondent employer under the authority of § 10(c) of the National Labor Relations Act, 49 Stat. 449, 29 U.S.C.A., § 151 *et seq.*, requiring respondent (1) to cease and desist (a) from refusing to bargain collectively with United Veneer & Lumber Workers Local Industrial Union No. 607 (hereafter referred to as "United"); (b) from discouraging membership in United; (c) from interfering with, restraining or coercing its employees in the exercise of their rights to self-organization guaranteed them by § 7 of the Act. The order further required the employer (2) to take affirmative action (a) upon request, bargain collectively with United as representative of the employees; (b) offer to certain employees full reinstatement to their former or substantially equivalent positions without prejudice to their seniority and (c-d-e) make whole certain employees for any loss of pay they may have suffered.

The proceeding before the Board was originally instituted by United against Hoosier Veneer Company and Frank Woolling, who had been appointed receiver of Hoosier by the Circuit Court of Marion County, Indiana, prior to the enactment of the Labor Relations Act. After hearing

and before the Board had rendered its decision Woolling died, and W. C. Bachelder, having been appointed receiver in lieu of Woolling, deceased, was substituted as respondent.

The contested issues are (1) did the Board have jurisdiction of the respondent, (2) are the findings supported by substantial evidence and (3) is the order valid and proper.

Respondent, as successor receiver for Hoosier Veneer Company, an Indiana corporation, is engaged at Indianapolis, Indiana, in the manufacture, sale and distribution of veneer and related products. January 17, 1933, the business of Hoosier was placed in charge of Woolling by the Circuit Court of Marion County, Indiana, who from that date until his death on January 15, 1939, continued in full charge of it. During his administration Woolling retained H. E. Daugherty, former president of Hoosier, as general-manager, and James C. Daugherty, former secretary-treasurer, as sales manager and to them he delegated responsibilities for production, sales and personnel, including the hiring and discharging of employees. January 17, 1939, Bachelder succeeded Wooling as receiver.

First. It is contended that the Labor Relations Act is not applicable to respondent. In support of this contention counsel asserts (a) the evidence fails to show any unfair practice affecting commerce, (b) the Board failed to obtain the consent of the court appointing the receiver, (c) the Act does not apply to a receivership, and (d) no complaint was filed which charged that respondent had violated the Act.

The facts, as found by the Board, are that Woolling, in course of operations during 1937, imported 73 carloads of logs which were shipped to respondent's plant from points outside the state of Indiana, including one carload from British Columbia and five from West Africa and that from 1933 to 1937 the major portion of the products sold by the receiver, ranging in value from approximately one-quarter million to over one-half million dollars per year, was shipped to out-of-state points and salesmen were maintained in nine principal furniture manufacturing areas in the United States. The Board concluded that the unfair labor practices had led and intended to lead to labor disputes burdening and obstructing commerce and the free

flow of commerce. We need say no more than that there was evidence justifying the finding and that support for the conclusion may be found in *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 604, and cases cited therein. See also *National Labor Relations Board v. Bradford Dyeing Assn.*, 310 U. S. 318.

We are of the opinion that there is no merit to the claim that before filing the complaint it was necessary to obtain the consent of the court appointing the receiver. The Labor Relations Act entrusted the exclusive power to prevent unfair labor practices with the Board and designated the Circuit Court of Appeals of the United States as the forum to which petitions for the enforcement or review of Board orders shall be addressed, § 10(a), (e) and (f), 29 U.S.C.A. § 160. See also *Amalgamated Workers v. Consolidated Edison Co.*, 309 U. S. 261, 266-269. The exercise of that jurisdiction does not depend upon the prior leave of a state receivership court. *McNulta v. Lochridge*, 137 Ill. 270, 141 U. S. 327; *United States v. Illinois Surety Co.*, 238 F. 840; *Hopkins v. United States*, 246 U. S. 655; *United States v. Federal Surety Co.*, 72 F. (2) 961.

Equally unsound is the contention that the Act does not apply to a receivership. § 10(a) of the Act empowers the Board to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce, and § 2(1) defines the term "person" as including "one or more individuals, partnership * * * or receivers." A somewhat similar contention was made in *National Labor Relations Board v. Colten*, 105 F. (2) 179.

As to the point that no complaint was filed which charged that respondent had violated the Act, it will suffice to say that on May 3, 1939, a supplemental complaint was filed substituting Bachelder in place of Woolling as the respondent.

Second. The respondent contends that the findings are not supported by substantial evidence. The Board found that Woolling has interfered with, restrained and coerced his employees in the exercise of their rights in violation of § 8(1). It also found that he refused to bargain collectively with United as the exclusive representative of his employees, and thereby violated § 8(5) of the Act and that

he violated § 8(3) of the Act by discriminating against 14 of his employees in regard to hire and tenure of employment.

United commenced organization activiies at the plant among respondent-receiver's employees in July, 1937, and continued through September, 1937, at which time three-fourths of the employees had signed membership applications. The Board found that a majority of Woolling's employees in the appropriate unit had designated United as their collective bargaining agent. September 30, 1937, United organizer Whitman notified Woolling of United's majority status and submitted to him a proposed collective agreement. Woolling refused to discuss the proposals, asserting that he had no specific authorization from the court appointing him. October 6 Whitman met with Woolling and his attorney, H. K. Bachelder, and requested that the proposed contract be considered and a tentative agreement formulated for presentation to the Marion Circuit Court. Thereafter Woolling applied to the court for instructions. The court on October 11, 1937, entered an order directing Woolling to terminate all manufacturing operations, excepting only such as are necessary for the fulfillment of orders or to prevent unusual depreciation, and authorized him to enter into discussion, at any time, with his employees regarding wages, hours and conditions of employment. Woolling closed the plant, but within 2 or 3 days operations were gradually resumed until on November 1, 1937, some 57 employees were at work. Woolling recalled all but 3 of the 31 non-union employees, but only 29 of the 96 members of United. Among those refused reinstatement were the 14 persons found by the Board to be the victims of unlawful discrimination.

Beginning about the latter part of August, 1937, Woolling, the two Daughertys, and superintendents Connor and Randall interrogated certain employees concerning their membership in United and inquired whether other employees had joined and, while questioning the men, they indicated displeasure at the activities of United and sought to block the spread of the organizing movement. The following are illustrative of such conduct. James C. Daugherty asked one Scott whether he belonged to United and when Scott told him he did, Daugherty replied: "Well,

Scotty, I hate that, I think the old man [H. E. Daugherty] will shut the plant down." Connor, on learning that employee Maynard was a member of United, said to Mayanrd "You may lose your job" and under similar circumstances Connor said to other employees "that their adherence to United would result in the closing of the plant." On October 11 H. E. Daugherty dismissed Scott thus: "Scotty, one time you stood mighty high with me, but that is all over now. When 4 o'clock comes * * * your work here is over. * * * You are permanently away from here." About two weeks after the plant had resumed operations and after one Peters had informed this same Daugherty that he was a member of United, Daugherty said to Peters: "Well, there will never be a job here for you. I am organizing this plant. I am doing all the hiring and firing. I am boss around here and intend to continue to be boss."

Randall requested Myrna Heady, an employee, to obtain for him the names of all the employees who were members of United and told her to go among them and have them indicate upon a veneer tape whether they were members. She approached Holyfield, who was president of the United, and requested that he state whether he was a member. Holyfield told her he would not so indicate on the tape, but if Randall desired to know how many had joined United he would tell him. Randall, having learned of what Holyfield told Heady, approached Holyfield and said, "I figured you would block Myrna."

It appears that after October 11, 1937, Woolling notied Whitman that H. K. Bachelder would act as his spokesman. A review of the record thereafter indicates and conclusively proves that during the period from October 13, 1937, to June 2, 1938, a number of conferences were held, all of no avail, and it is clear that neither Woolling nor Bachelder made any real effort to reach an agreement with United. In the conference of June 2, 1938, Whitman met with Bachelder and two Indiana State labor conciliators and explained that the proposed contract called for recogniation of United as the exclusive bargaining agent to which Bachelder replied: "Oh, no; nothing of the kind. I wasn't called upon to recognize a Union." At that same conference, when an effort was made to discuss the question of the reinstatement of the employees, Bachelder replied:

> "That is not a part of negotiation. Negotiation contemplates an agreement for future activities but does not contemplate a settlement of past grievances. It involves future relationships for employer and employees. It is toward the future and not toward the past. They are two distinct and separate situations and the law recognizes them. It would be a waste of time to say whether this man ought to be working in place of somebody else or anything with reference to that."

We note here that at no time was the refusal to recognize United and bargain with it based upon a lack of a majority of the employees, or upon an absence of a majority in an appropriate unit.

Such was the situation with which the Board had to deal.

Section 8(5) of the National Labor Relations Act, 29 U.S.C.A. § 158 (5), declares it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees subject to the provisions of § 9 (a). The latter section provides that the subject matter of collective bargaining covers rates of pay, hours of employment, or other conditions of employment. In *Globe Cotton Mills v. National Labor Relations Board*, 103 F. (2) 91, 94, the court said:

> "there is a duty on both sides * * * to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement touching wages and hours and conditions of labor, and if found to embody it in a contract as specific as possible, which shall stand as a mutual guaranty of conduct, and as a guide for the adjustment of grievances."

We approve and adopt what was said there.

In our opinion the facts above related established a reasonable basis for the conclusions of the Board that Woolling had refused to bargain collectively with the United as the exclusive agent of his employees and that he did interfere with, restrain and coerce his employees in the exercise of their rights to self-organization guaranteed in § 7 of the Act. *National Labor Relations Board v. Friedman*,

etc., 301 U. S. 58, 75; *National Labor Relations Board v. Fansteel, etc.*, 306 U. S. 240, 251; and *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 358.

We now discuss the question of discrimination in regard to the hire and tenure of employment. The Board found that most of the employees who had been refused reinstatement were experienced and had been employed by Veneer and Woolling for many years. It also found that upon reopening the plant Woolling, instead of choosing for reinstatement the men best qualified for the positions available, employed men he believed least likely to interfere with his plans for stamping out union activities.

A review of the record discloses that prior to the shutdown Woolling had employed 96 union members, constituting 76% of the total number of employees, and 31 nonuion employees which represented 24% of the total. On November 3, 1937, he had 57 persons working, 29 union and 28 non-union. Only 3 non-union employees were not reinstated. Among the union men not reinstated were the president, vice-president and treasurer of United, two leaders of the organizing campaign and nine employees who had been active in soliciting members for United.

Counsel for respondent insists that in determining discrimination substantial evidence must support the finding as to each man, and the fact that one was found to have been discriminated against is not evidence that any other was discriminated against. Likewise, he says, the fact that the 14 men named included a large proportion of those most active in United is not evidence that any man was discriminated against.

However that may be, the disproportionate treatment of union and non-union workers may under certain circumstances be very persuasive evidence of discrimination, *Montgomery Ward & Co. v. National Labor Relations Board*, 107 F. (2) 555, and evidence that the men not reinstated were members of a negotiating committee may be sufficient to support a finding that such employees were discriminated against. *New York Handkerchief Mfg. Co. v. National Labor Relations Board*, 114 F. (2) 144.

It is unnecessary to recite in detail the evidence supporting the Board's findings as to discrimination. We have read and considered it and experience no difficulty in arriving at the conclusion that there was ample evidence justifying the finding that these employees had been discriminated against.

Respondent raises the point that the men were not Woolling's employees. He says that is so because their work had ceased solely as a consequence of the order of the Marion Circuit Court.

This record clearly shows and the Board found that the order of the court did not contemplate a permanent cessation of operation, nor did Woolling so construe the order, as the plant reopened almost immediately. We think there was evidence to sustain the finding. We conclude that under the facts here there was not a severance of the relation of employer and employee. *North Whittier Heights, etc., v. National Labor Relations Board*, 109 F. (2) 76 and *National Labor Relations Board v. Waterman Steamship Corp.*, 309 U. S. 206.

There is substantial evidence to support the Board's findings that the employees named in (2) (c-d-e) were discriminated against because of their membership in United in violation of § (3), and the order that they be offered reinstatement and made whole will be enforced.

Third. Respondent insists the order is invalid because (a) if there was a violation of the Act he was not the guilty person; (b) to enforce the order of the Board will interfere with the jurisdiction of the Marion Circuit Court; and (c) the persons ordered reinstated were not employees. It is obvious from what we have already said that these claims have been discussed and decided adversely to respondent.

The point is also pressed that petitioner has forfeited all right to enforce the order of the Board because of laches. The complaint was issued September 26, 1938. The order was entered on March 22, 1940, and the petition for enforcement was filed in this court on November 8, 1940. In a like situation, *National Labor Relations Board v. Aluminum, etc.*, decided March 4, 1941, our court said:

> " * * * we do not understand that orders lose their validity or cease dynamic existence merely because the Board delays in seeking an enforcement order. From the time of its entry, it was binding upon respondents. If they believed it should not be enforced, they had a right to assert belief in a proper proceeding. This they failed to do."

We think what was said in that case is applicable here.

Paragraphs 2(c-d-e) direct that certain sums be deducted from the amounts to be paid to the employees named, and paid to certain specified governmental agencies. Such a direction is invalid. *Republic Steel Corp. v. National Labor Relations Board*, 311 U. S. 7.

The Board's order is modified with the views herein expressed and as so modified, its petition for enforcement is allowed.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

DECREE.

The National Labor Relations Board having on March 22, 1940, issued an order against W. C. Bachelder, receiver for Hoosier Veneer Company, and having petitioned this Court for enforcement of said order, this Court having considered the same, and having on March 13, 1941, issued its decision enforcing said order as modified, it is hereby

ORDERED, ADJUDGED AND DECREED, that W. C. Bachelder, receiver for Hoosier Veneer Company, his agents, successors, and assigns, including Hoosier Veneer Company in the event the receivership is discharged, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United

Veneer and Lumber Workers Local Industrial Union No. 607, affiliated with the C.I.O., as the exclusive representative of the production and maintenance employees, exclusive of clerical and supervisory employees, employed at the plant in Indianapolis, Indiana;

(b) Discouraging membership in United Veneer and Lumber Workers Local Industrial Union No. 607, affiliated with the C.I.O., or in any other labor organization of the employees, by discharging or refusing to reinstate any of the employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment;

(c) In any other manner interfering with, restraining, and coercing the employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid and protection, as guaranteed in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Veneer and Lumber Workers Local Industrial Union No. 607, affiliated with the C.I.O., as the exclusive representative of the production and maintenance employees, excluding clerical and supervisory employees, employed at the plant in Indianapolis, Indiana, in respect to rates of pay, wages, hours of work, and other conditions of employment;

(b) Offer to Frank Toler, Eugene Montgomery, Frank Scott, Jesse Holyfield, Eugene Brummett, O. W. Humrichouse, Hayden Arthur, Charles Arthur, James Short, Omer Lee Cookenour, William Maynard, and B. M. Wasson immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority and other rights and privileges, dismissing if necessary all employees hired since October 11, 1937; provided, that if despite and after a dismissal of all such employees

there is not sufficient employment immediately available for the employees presently working, exclusing those dismissed, and for the employees to be offered and who shall accept reinstatement, then all positions of employment shall be distributed among the employees presently working, excluding those dismissed, and the employees to be offered and who shall accept reinstatement, in accordance with respondent's usual method of reducing his force, without discrimination against any employee because of his or her union affiliation and activities, following such a system of seniority or other non-discriminatory procedure as has been heretofore applied by respondent in the conduct of the business; and provided further, that those employees remaining after such distribution for whom no employment is immediately available shall be placed by respondent on a preferential list, with priority determined among them in accordance with such system of seniority or other non-discriminatory procedure as has been heretofore applied by respondent in the conduct of the business, and that thereafter, in accordance with such list, they shall be offered reinstatement by respondent in their former or substantially equivalent position, as such employment becomes available and before other persons are hired for such work;

(c) Make whole Frank Toler, Eugene Montgomery, Frank Scott, Jesse Holyfield, Eugene Brummett, O. W. Humrichouse, Hayden Arthur, Charles Arthur, James Short, Omer Lee Cookenour, William Maynard, and B. M. Wasson for any loss of pay they have suffered by reason of the discrimination against them, by payment to each of them of a sum of money equal to that which each would normally have earned as wages during the period from November 1, 1937, to the date of the offer of reinstatement, less his net earnings[1] during said period; deducting, however, from the amount otherwise due to each of said employees, monies received by said employees during said period for work performed upon Federal, State, county, municipal, or other work-relief projects;

[1] By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent receiver, which would not have been incurred but for the discrimination against him and the consequent necessity of his seeking employment elsewhere.

(d) Make whole Harold Peters by payment to him of a sum of money equal to that which he would normally have earned as wages during the period from November 1, 1937, to the date of his reinstatement, less his net earnings during said period; deducting, however, from the amount otherwise due to him, monies received by him during said period for work performed upon Federal, State, county, municipal, or other work-relief projects;

(e) Make whole William Coffey by payment to him of a sum of money equal to that which he would normally have earned as wages during the period from November 1, 1937, to on or about September 6, 1938, less his net earnings during said period; deducting, however, from the amount otherwise due to him, monies received by him during said period for work performed upon Federal, State, county, municipal, or other work-relief projects;

(f) Immediately post notices in conspicuous places throughout the Indianapolis, Indiana, plant stating that respondent will not engage in the conduct from which he is ordered to cease and desist in paragraphs 1 (a), (b), and (c) of this Order, etc.

(g) Notify the Regional Director for the Eleventh Region in writing within ten (10) days from the date of this Order what steps respondent has taken to comply herewith.

(Signed) EVAN A. EVANS
Judge, United States Circuit Court of Appeals for the Seventh Circuit

(Signed) OTTO KERNER
Judge, United States Circuit Court of Appeals for the Seventh Circuit.

(Signed) WALTER C. LINDLEY
Judge, United States District Court for the Eastern District of Illinois, acting as Judge of the United States Circuit Court of Appeals for the Seventh Circuit.

Dated:

III.

QUESTIONS PRESENTED AND REASONS FOR ALLOWANCE OF WRIT.

A writ of certiorari should be allowed in the instant case for each of the following reasons:

1. The Circuit Court erred in finding this petitioner, a court receiver, guilty of law violations solely because of acts of a previous receiver, all done while the previous receiver was in office; and without any evidence against this petitioner.

A. The above ruling is in direct conflict with this Court's decision in *National Labor Relations Board v. Express Publishing Co.*, 85 L. Ed. 614, which holds: "The breadth of the order, like the injunction of a court, must depend on the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past."

B. The above ruling is on an important question of general law, and it was decided in a way that is untenable and is in conflict with the National Labor Act in that the finding of unfair labor practices against petitioner is not based upon any evidence showing that petitioner was an employer at the time and was engaged in interstate commerce, and committed some act which would justify the conclusion that he was guilty of any unfair labor practice.

2. The Circuit Court of Appeals erred in holding that

the National Labor Relations Act gave the Labor Board control over the administration of a State Court receivership.

A. The above ruling is an important question of Federal law which has not been, but should be settled by this Court.

3. The Circuit Court of Appeals erred in holding that it had jurisdiction to direct the conduct of a State Court receivership and determine the manner in which its funds shall be expended, without the consent of the State Court.

A. The above ruling is in direct conflict with numerous decisions of this Court including *Lion Bonding and Surety Co. v. Karatz*, 262 U. S. 77, which holds that a receivership court, having obtained jurisdiction, has the right to determine for itself how far it will permit any other court to interfere with its possession and jurisdiction.

B. The above ruling is in conflict with this Court's decision in *American Surety Co. v. Baldwin*, 287 U. S. 155, which holds that the "Full faith and credit" clause of the Constitution forbids a Federal Court from questioning proceedings of a State Court in an independent action.

4. The Circuit Court of Appeals erred in holding that the National Labor Relations Act gave the Labor Board jurisdiction over a State Court receivership without the consent of that Court.

A. The above ruling is an important question of Federal law which has not been, but should be, settled by this Court with regard to this particular statute.

B. The above ruling is in conflict with numerous decisions of this Court and particularly *Ex Parte Tyler*, 149 U. S. 163, which holds that no branch of government can interfere with or disturb the conduct of a receivership without consent of the receivership court.

5. The Circuit Court of Appeals erred in holding that a receivership can be found guilty of unfair labor practices because of unauthorized statements of corporate officials.

A. The above ruling is an important question of general law and is decided in a way that is untenable and in conflict with the weight of authority.

6. The Circuit Court of Appeals erred in holding that a receivership can be found guilty of unfair labor practices because of unauthorized expressions of opinion of foremen in the factory.

A. The above ruling is an important question of general law and is decided in a way that is untenable and in conflict with the weight of authority.

7. The Circuit Court of Appeals erred in holding that statements by employees of a receivership are any evidence of the intent or policy of the receivership with regard to its attitude toward labor, in the absence of evidence that the making of the statements was known or authorized by either the receiver or the receivership court.

A. The above ruling is an important question of both Federal and general law which has not been, but should be, settled by this Court.

8. The Circuit Court of Appeals erred in holding that an employer can be found guilty of violating Section 8 (5)

of the National Labor Relations Act before an appropriate unit and its lawful representatives have first been determined pursuant to the provisions of Section 9 of said act.

A. The above holding is an important question of federal law which has not been, but should be, settled by the Court.

9. The Circuit Court of Appeals erred in holding that evidence of efforts by non-union employees of a receivership to learn who belonged to the union, constituted any evidence of unfair labor practices upon the part of the receivership, the then receiver or a subsequent receiver.

A. The above is an important question of general and federal law which has not been, but should be, settled by this Court.

10. The Circuit Court of Appeals erred in holding that the Labor Board could award back pay without reinstatement.

A. The above holding is a decision in conflict with the decision of the Ninth Circuit Court of Appeals on the same matter in the case of *National Labor Relations Board v. Carlisle Lumber Co.*, reported in 99 F. (2) 533.

11. The Circuit Court of Appeals erred in holding that a variance in the proportion of union to non-union men reemployed by a receiver when operating on a limited basis after a general shut-down on order of the receivership court, could be substantial evidence of unlawful discrimination by the receiver, the trust, or a subsequent receiver, in the absence of any evidence of knowledge by the receiver of the union affiliation of the greater part of the employees, and

without any recognition or consideration of the facts or circumstances pertaining to any individual or to any job.

A. This holding constitutes a decision of an important question of federal law which has not been, but should be, settled by this Court.

12. The Circuit Court of Appeals erred in holding that any of the men to whom back pay was ordered were employees of either receiver or of the trust at the time it was charged or found that they were discriminated against.

A. This ruling is an important question of federal law which has not been, but should be, settled by this Court.

13. The Circuit Court of Appeals erred in ordering a state court receiver to employ a man whom the receivership court had ordered the prior receiver to discharge and never re-employ.

A. This ruling is a decision of an important question of federal law which has not been, but should be, settled by this Court.

14. The Circuit Court of Appeals erred in holding that the Labor Board could not forfeit its right to enforcement of an order because of laches based upon unreasonable and unexplained lapse of time between the acts complained of, and the order.

A. This holding is a decision of an important question of federal law which has not been, but should be, settled by this Court.

B. The above holding is a decision in conflict with

the decision of the Second Circuit Court of Appeals on the same matter in the case of *National Labor Relations Board v. National Casket Co.*, Inc., reported in 107 F. (2) 992.

15. The Circuit Court of Appeals erred in holding that an employer unsuccessful before the Labor Board, who denied the jurisdiction over his person of either the Board or an enforcing court, must abandon his jurisdictional contention or submit to unlimited enhancement of possible back pay liability because of unreasonable delay by the Board in seeking enforcement of its order.

A. The above ruling is an important question of both federal and general law which has not been, but should be, settled by this Court.

16. The Circuit Court erred in holding that the receivership was engaged in interstate commerce which might be affected by a labor dispute after the receivership court ordered the plant shut down.

A. The above ruling is an important question of federal law which has not been, but should be, settled by this Court.

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SUPPORTING BRIEF

I.

The opinion of the Seventh Circuit Court of Appeals had not been officially reported when this brief was written.

II.

JURISDICTION.

This is granted by statute; 28 U.S.C.A. 347, providing for certiorari; and 29 U.S.C.A. 160 (e) giving Circuit Court of Appeal jurisdiction to enforce orders of National Labor Relations Board.

III.

STATEMENT OF CASE.

On January 17, 1933, the Circuit Court of Marion County, Indiana, sitting in equity, appointed Frank F. Woolling, Receiver for the Hoosier Veneer Co., a corporation previously engaged in the manufacture and sale of veneer. (See opinion of Seventh Circuit Court of Appeals.) In 1938, pursuant to a complaint issued September 26, 1938 (Board's Appendix P. 3-7), the Labor Board instituted proceedings against the corporation and Frank F. Wooling, Receiver, charging unfair labor practices. (See opinion of Seventh Circuit Court of Appeals.)

The receiver, Frank F. Woolling appeared specially and contested the jurisdiction, and refused to appear otherwise; but the corporation appeared and defended. After the trial, and before the Board's decision, Frank F. Woolling died,

January 15, 1939. (See opinion of Seventh Circuit Court of Appeals.) On January 17, 1939, this petitioner was named receiver. (See opinion of Seventh Circuit Court of Appeals.)

After the appointment of this petitioner the Board substituted this petitioner; and on March 22, 1940, entered an order finding that this petitioner was guilty of unfair labor practices as follows:

a. That petitioner interfered with, restrained and coerced his employes in the exercise of their rights in violation of Paragraph 8-1 of the Act.

b. That petitioner refused to bargain collectively with the union in violation of Paragraph 8-5 of the Act.

c. That petitioner discriminated against fourteen of his employees in regard to hire and tenure of employment in violation of Paragraph 8-3 of the Act. (See opinion of Seventh Circuit Court of Appeals.)

The Board ordered that this petitioner (1) cease and desist (a) from refusing to bargain collectively with the union; (b) from discouraging membership in the union, (c) from interfering with, restraining or coercing its employees in their rights to self-organization guaranteed them under Paragraph 7 of the Act. The order further required petitioner (2) to take affirmative action; (a) upon request, bargain collectively with the union; (b) offer to certain employees full reinstatement to their former or substantially equivalent positions without prejudice to their seniority; and (c, d, e) make whole certain employees for any loss of pay they may have suffered. (See opinion of Seventh Circuit Court of Appeals.)

There was no evidence that this petitioner ever employed anyone, ever engaged in interstate commerce, ever refused to bargain with anyone, ever discriminated against any employee, or ever interfered with, restrained, or coreed any one. There was no evidence that this petitioner in any way participated in the conduct of the affairs of this receivership other than his appointment January 17, 1939, as heretofore stated.

The record shows that when Frank F. Woolling was approached by a man who demanded that he contract with the union, said Woolling advised the court of that fact and the condition of the trust and asked for instructions; and the court, after examining the business conditions of the trust entered the following order (Petitioner's Appendix P. 220-221):

EXCERPTS FROM RESPONDENT'S EXHIBIT NO. 1

In the Marion Circuit Court—Cause No. 47617.

State of Indiana,
County of Marion, ss:

JAMES C. DAUGHERTY vs. HOOSIER VENEER COMPANY. ORDER ON RECEIVER'S PETITION FOR INSTRUCTIONS.

* * *

And the Court having read the petition and having been advised in the premises finds that the facts set up in said petition are true and that there has been a pronounced decline in the sales of manufactured product by said receiver during the last four months as compared with the previous experience, and further finds that the receiver, in reasonable

expectation of a continuance of his past experience, has manufactured products for an anticipated fall business which did not materialize to the extent that he now has a surplus of manufactured products on hands. The Court further finds that there are substantial evidence of sabotage upon the part of someone. The Court further finds that in view of the surplus of raw materials on hands that it would not be for the best interests of the Trust to continue manufacturing operations other than such as is necessary for the purpose of filling received orders or for the protection of specific material against unreasonable depreciation. The Court further finds that in view of the existence of sabotage it is not to the best interest of the Trust that any further manufacturing operations, other than those just above indicated, be engaged in until such time as the extent of the damage resulting from such sabotage can be determined and those responsible definitely eliminated from any further contact with said business.

Now therefore, it is ordered and decreed by the Court that the receiver terminate all manufacturing operations of said plant, excepting only such as are necessary for the fulfillment of orders after the same have been received or to prevent unusual depreciation; and that the receiver make investigation to determine the extent of the damage resulting from deliberate injury to products or from unreasonable negligence in the manufacture thereof; and that the receiver make investigation to try to determine the person or persons rsponsible for said damage; and that the receiver report back to this Court the extent of said damage together with such information as he may be able to ascertain tending to indicate the parties responsible therefore. The Court further instructs the receiver that he has authority to enter into discussion, at any time, with those then in his employ, with regard to the rate of wages, hours of labor, or conditions of

employment; and that, if the receiver as a result of such discussions is of the opinion that any material change relating to any of said above mentioned subjects should be made that the report his recommendations to the Court for further instructions thereon. And the Court hereby further specifically orders and directs the receiver to discharge and never re-employ any person or persons whom the receiver may find to have been responsible for any damage to property of the trust by reason of deliberate injury thereto or because of gross negligence in the manufacture thereof.

EARL R. COX,

Judge of the Circuit Court.

The record shows no instance in which Woolling failed to abide by and carry out said order. The record shows that Frank F. Woolling employed two former officers of the corporation, H. E. Daugherty and J. C. Daugherty, to perform services, but the only evidence that either of these men had any power to hire or discharge is from expressions of opinion by themselves or others in no way shown to be qualified to speak authoritatively, for Frank F. Woolling or the Court. (Board's appendix 127, 129, Respondent's appendix 15, 27, 28, 33, 41, 42, 47 and 48.)

One of the men ordered reinstated was found by the uncontradicted evidence to have been guilty of gross negligence causing damage to property and loss of business. (Board's appendix 184-186, Respondent's appendix 39.)

Detailed facts as to the charges against Frank F. Woolling will only be referred to in the argument, and it would destroy the usefulness of this brief to attempt to state them here.

IV.

SPECIFICATION OF ERRORS.

Each of the errors assigned in the petition are urged as grounds for granting the petition. They will be argued under the heading and in the order that they appear in the petition and are by reference made a part of this brief.

V.

ARGUMENT.

1.

THE CIRCUIT COURT ERRED IN FINDING THIS PETITIONER, A COURT RECEIVER, GUILTY OF LAW VIOLATIONS SOLELY BECAUSE THE ACTS OF A PREVIOUS RECEIVER, ALL DONE WHILE THE PREVIOUS RECEIVER WAS IN OFFICE: AND WITHOUT ANY EVIDENCE AGAINST THIS PETITIONER.

A.

This Court in the case of *National Labor Relations Board v. Express Publishing Co.*, 85 L. Ed. 614, held in effect that the enforcement of the National Labor Relations Act was preventive. That the purpose of the order was to prevent violations in the future, the threat of which is indicated because of similar violations in the past by the same offender.

Assuming that Frank Woolling, receiver, violated the law there is no doubt but what he could have been punished and restrained from violating the law in the future. In this case, however, there is no fear that Frank F. Woolling will violate the law in the future because he is dead.

This petitioner has not violated the labor act or any of its provisions. The only evidence against this petitioner is that he was appointed receiver after the death of Frank F. Woolling and after the hearing before the Board. Not having violated the law in the past there can be no presumption that petitioner will violate the law in the future and the

order of the Seventh Circuit Court of Appeals is in direct conflict with this Court's decision as above referred to.

B.

The Court's ruling on this point is further untenable because it found this petitioner guilty of violating the National Labor Relations Act, although there is no evidence that this petitioner ever employed any labor, ever engaged in interstate commerce, ever interfered with, restrained or coerced any employees, ever refused to bargain collectively or ever discriminated against any employees. Under the provisions of the National Labor Relations Act no person can be found guilty of violating the act unless there is some evidence to prove his guilt. Furthermore, no person can be punished for violating this or any other law of the land unless he is first found guilty.

There is nothing in the bare fact that this petitioner was appointed an equity receiver that gives rise to any presumption that petitioner intends to or will violate the National Labor Relations Act, nor is there any presumption that this petitioner will violate the act because some previous receiver violated the act. Suppose the new receiver was a member or officer of the Union. Would he be guilty of violating the act because of the conduct of the previous receiver?

In fact, all the presumption of law is to the effect that this petitioner will not violate either the Labor Relations Act or any other law of the land, and this presumption stands until there is some evidence breaking down that presumption and tending to prove that petitioner has or intends to violate the law.

Obviously, the Circuit Court of Appeals was in error

when it ordered this petitioner to cease and desist from law-violations when he was admittedly innocent of any violations of law.

There is no presumption arising from the status of receiver that would justify any inference of hostility towards employees. Neither the receiver nor the Court stands to gains or lose by the terms of employment. A receiver has no share in the profits or the losses of the business. His employment does not depend upon his giving satisfaction to the owners of the business. So long as he obeys the lawful orders of the court and does not violate the laws of the land, he is governed solely by his own conscience in the care and efficiency with which he handles the trust. The presumption is that he will obey the law and that he will not misconduct himself where he has nothing to gain by such misconduct.

2.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE NATIONAL LABOR RELATIONS ACT GAVE THE LABOR BOARD CONTROL OVER THE ADMINISTRATION OF A STATE COURT RECEIVERSHIP.

This Court has frequently held that words in a statute should be given their plain and ordinary meaning in the English language, unless they are so ambiguous that it is necessary to resort to other methods to determine their meaning. One of the leading cases upon this question is *Caminetti v. U. S.*, 242 U. S. 470. In defining the word "person" the National Labor Relations Act includes as a person the words "receivers" and "trustees in bankruptcy." It makes no mention of receiverships or bankruptcies, nor does it make any mention of "judicial bodies" having charge

of a business or trust as is contained in the Railway Labor Act. Section Two, Paragraph Two of the act specifically excludes a state or political subdivision thereof.

The word "receiver," given its plain and ordinary meaning, is a person, natural or artificial, who has been appointed by a court to administer the assets of a trust created by a receivership. It does not include "receiverships" or "receivership courts."

It may be taken for granted that Congress knew how to include receiverships under the jurisdiction of the Labor Board if it had so desired, and this is well borne out by the fact that it did so desire in the Railway Labor Act. In fact it indicated a contrary desire by excluding political subdivisions of states, which undoubtedly excludes judicial circuits and other state courts.

The reason for the failure of Congress to include receiverships within the jurisdiction of the Labor Board is perfectly sound and logical. In the first place, receiverships are usually emergency matters, and the operation of a business in a receivership is temporary and its continuation is subject to circumstances and conditions not in any way involving labor disputes and concerning which the receivership court is in a better position to judge. The only exceptions to this rule are receivership of public utilities, which are so impressed with the public interest that they are not at any time given over entirely to the control of a court. That is the essential difference between the National Labor Relations Act and the Railway Labor Act.

In the second place, a receivership court is only a temporary employer of labor. It has no personal financial interest in the profits or losses of the business and due to the

very nature of equity receiverships, it is not in position to formulate permanent policies towards its employees or enter into contracts for any definite future time.

In the third place, there is considerable doubt as to the power of Congress to grant to a federal board jurisdiction over a state court and it is very doubtful that Congress would have cared to take such an unusual step.

3.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT IT HAD JURISDICTION TO DIRECT THE CONDUCT OF A STATE COURT RECEIVERSHIP AND DETERMINE THE MANNER IN WHICH ITS FUNDS SHALL BE EXPENDED WITHOUT THE CONSENT OF THE STATE COURT.

A.

The Court's order directs the receivership to re-employ fourteen ex-employees, and to pay them back pay. This is a direct charge upon the receivership and not upon the receiver as a person. While it is true that a receiver because of his official position, is not immune from punishment for his violations of law and might be ordered to cease and desist from continuing to violate the law, yet this provision of the decree is not directed to the receiver as an individual, but it is a charge upon the trust fund in the hands of the court and a direction as to the future conduct of the court in the management of the receivership. This is directly repugnant to many decisions of this Court. Petitioner cites one of the recent decisions, the case of *Lion Bonding & Surety Co. v. Karatz*, 262 U. S. 77. These cases hold that when a receivership court has jurisdiction, so long as that jurisdic-

tion continues that court has the right to determine for itself how far it will permit any other court to interfere with its possession and jurisdiction. The only cases cited by the Circuit Court in defense of its position do not support that Court's ruling. The first case cited in the opinion is *Amalgamated Workers v. Consolidated Edison Co.*, 309 U. S. 261. This case did not involve the question of the consent of the receivership court, it only involved the right of someone other than the Labor Board to seek punishment for contempt for violation of an order of enforcement. The next case cited is *McNulta v. Lockridge*, 141 U. S. 329. This case not only does not support the Circuit Court's decision, but holds to the contrary. It then points out the distinction between the general rule and cases coming under an act of Congress providing for suits against certain Federal Court receivers without previous leave. This act of Congress does not apply to state court receiverships but to Federal Courts whose jurisdiction is directly under the control of Congress. The next case is a District Court decision, *U. S. v. Illinois Surety Co.*, 238 Fed. 840. It is not in point, it merely makes certain exceptions in certain suits in the name of the United States, but even then it provides that all enforcement must be obtained by intervention in the receivership court. The next case was *Hopkins v. U. S.*, 246 U. S. 655, and is a decision in the District Court case previously cited. It is a memorandum opinion referring to *U. S. v. Congress Construction Co.*, 222 U. S. 199, and it does not either refer to or decide the point in question. The next case *U. S. v. Federal Surety Company*, 72 Fed. (2) 961, did not involve an equity but a statutory liquidator, whose title is not the consequence of a court's decree.

In the Railway Labor Act receiverships are specifically included, although jurisdiction is not given to a Board, but

only to District Courts. However the Second Circuit Court of Appeals in two decisions held that the proper procedure was to submit the matter to the receivership court and if aggrieved by the action of that court, to pursue the remedy of appeal or review. *Burke v. Morphy, et al.*, 109 Fed. (2) 572. *Grand International Brotherhood v. Morphy*, 109 Fed. 576.

B.

The above ruling is also in conflict with this Court's decision in *American Surety Co. v. Baldwin*, 287 U. S. 156. This court in the above case held that the "full faith and credit" clause of the Constitution forbids a Federal Court from questioning the proceedings of a state court in an independent action.

To support the Court's order to re-employ and pay out back pay constitutes an interference with the proceeding of the receivership court and a questioning of its proceedings in the receivership. What would be the result if the receivership court should enter an order to its Receiver not to comply with the order of enforcement? The answer to that question obviously requires the careful consideration of this Court, and indicates the extreme importance of this petition and the necessity that certiorari should be granted.

4.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE NATIONAL LABOR RELATIONS ACT GAVE THE BOARD JURISDICTION OVER A STATE COURT RECEIVERSHIP WITHOUT THE CONSENT OF THAT COURT.

A.

Under Number Two this petitioner discussed the question as to whether or not the act included receiverships and will not discuss that question again at this place. Even assuming that the act did cover receiverships there is no indication that Congress intended to change the universal rule that receiverships could not be interfered with without the consent of the receivership court. While the Railway Labor Act specifically includes receiverships it did not grant jurisdiction to proceed against receiverships to a governmental agency other than the judicial, and the Second Circuit Court of Appeals has held that the proper procedure under that act is in the receivership court itself. *Burke v. Brophy, et al.*, 109 Fed. (2) 572, *Grand International Brotherhood v. Morphy*, 109 Fed. (2) 576.

Before 1926 the Internal Revenue acts purported to give that department power to distrain property without judicial proceedings. It was held that Congress could not give the power to the department to proceed against receivership property without filing claim in the receivership court. *Scott v. Western Pacific Railroad*, 246 Fed. 545, 546. In 1926, Congress recognizing this limitation on its power, made special provision in the Internal Revenue Act requiring the collector of internal revenue to file claims in receivership courts, and this provision has been included in every subsequent revenue act.

There is no reason to assume that Congress intended to override this general and well-established rule of law. If it had intended to do so and thought it had the power to interfere with a state receivership contrary to the then existing laws, undoubtedly it would have made some provision directly expressing that intention. *H. P. Welch Co. v. New Hampshire*, 306 U. S. 79, 85.

B.

The above rule is in direct contravention of this Court's ruling in a line of decisions. The general rule is particularly expressed in *Ex Parte Tyler*, 149 U. S. 163. The principle laid down in that case is as follows on Page 182:

> "The maintenances of the systems of checks and balances, characteristic of republican institutions, requires the co-ordinate departments of government, whether federal or state, to refrain from any infringement of the independence of each other, and the possession of property by the judicial department, cannot be arbitrarily encroached upon, save in violation of this fundamental principle."

The order against this petitioner requiring the receivership to re-employ certain employees without any regard to the necessity of their employment, and to pay them back wages which must be taken from the receivership funds, constitutes a direct violation of the above legal principles. It is an intereference with the possession and jurisdiction of the state court.

5.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT A RECEIVERSHIP CAN BE FOUND GUILTY OF UNFAIR LABOR PRACTICES BECAUSE OF UNAUTHORIZED STATEMENTS OF CORPORATE OFFICIALS.

This is an important question of general law and is wholly untenable because it denies full faith and credit to the decisions of the state court. There is no presumption in law that the receivership court intends to or will violate any federal law and when it judicially appoints a receiver

and instructs him to conduct a business, that decision is assumed to be a court order for the receiver to conduct the business in a lawful way and unless authorized by court order, no statements or expressions of opinion by employees of the receivership can bind the court to any different intention or policy.

In support of an order punishing this receivership the Circuit Court held that the intention of the receivership to commit unfair labor practices was proven by statements and expressions of opinion of different employees of the receivership. Two of them were officials of the corporation (H. E. Daugherty and J. C. Daugherty), the others were foremen in the factory. There is nothing in the evidence to show that the state court authorized these men to speak the intentions and policies of the court. There is nothing in the status of a receivership to justify the inference that the state court or the receiver were hostile to labor unions.

It is true that it may be inferred that the former owners of the business and men who had formerly worked for them might take a hostile attitude towards labor unions, but their hostility can not be imputed to the receivership or to the receivership court and the receiver, to the extent of breaking down the assumption that the receivership is being lawfully conducted.

6.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT A RECEIVERSHIP CAN BE FOUND GUILTY OF UNFAIR LABOR PRACTICES BECAUSE OF UNAUTHORIZED EXPRESSIONS OF OPINION OF FOREMEN IN THE FACTORY.

The above point has been argued under the preceding heading.

7.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT STATEMENTS BY EMPLOYEES OF A RECEIVERSHIP ARE ANY EVIDENCE OF THE INTENT OR POLICY OF THE RECEIVERSHIP WITH REGARD TO ITS ATTITUDE TOWARD LABOR, IN THE ABSENCE OF EVIDENCE THAT THE MAKING OF THE STATEMENTS WAS KNOWN OR AUTHORIZED BY EITHER THE RECEIVER OR THE RECEIVERSHIP COURT.

The Court sustains the finding that the prior receiver interfered with, restrained and coerced his employees in violation of Sec. 8 (1) of the Act (Opinion P. 6, L. 31-34). This was based principally on alleged statements by employees of the trust, especially the former president and secretary-treasurer of the company, and two foremen (Opinion P. 4, L. 38 to P. 5, L. 23). There was no evidence that the former receiver, the present receiver, or the re-receivership court ever authorized any of these statements; or knew in advance that any of them were going to be made; or knew, prior to the hearings, that they had been made. While the opinion, on Page 2, states that the former receiver retained certain former officers of the corporation and "to them he delegated responsibilities for production, sales and personnel, including the hiring and discharging of employees," this quoted statement is in no way supported by the record and the uncontradicted evidence is to the contrary (Board's appendix, P. 127, 129; Respondent's appendix, P. 15, 27, 28, 33, 41, 42, 47 and 48). On the basis of this finding the present receiver was enjoined, and the trust was punished.

This evidence does show that the former president was

claiming that he, not the receiver, was running the business. It also shows that some of the old employees still looked upon him as the boss. It also shows that his mental attitude was very antagonistic to the union. But it does not tend to show anything about the attitude of either receiver or the receivership court toward the union.

Petitioner contends that the policy of a court receivership is determined by the court, not by the receiver, or his employees; or by officers of the corporation in the employ of the trust. The burden was on the Board to prove by substantial evidence the mental attitude or policy of the receivership, and not merely acts of its employees for which it might be liable in tort.

The mental attitude or policy of a receiver is not necessarily the mental attitude or policy of the receivership. To not make this distinction is to ignore the receivership court. And certainly the mental attitude or policy of the present receiver is not established by evidence offered to prove the attitude and policy of a prior receiver.

Thus petitioner presents the question as to whether the evidence of statements by employees recited in the opinion is substantial, or even any, evidence to sustain an order against either the present receiver or the trust itself. Respondent contends it is not, and that the question is an important question of the application of the Labor Act, and also an important question of the general law of evidence which should be settled by this Court.

8.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT AN EMPLOYER CAN BE FOUND GUILTY

OF VIOLATING SECTION 8 (5) OF THE NATIONAL LABOR RELATIONS ACT BEFORE AN APPROPRIATE UNIT AND ITS LAWFUL REPRESENTATIVES HAVE FIRST BEEN DETERMINED PURSUANT TO THE PROVISIONS OF SECTION 9 OF SAID ACT.

Sec. 8 (5) of the Act provides that an employer is guilty of an unfair labor practice if he refuses to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a). Sec. 9 (a) provides that representatives selected by the majority of the employees in a unit appropriate for collective bargaining, shall be the exclusive representatives of all employees in the unit. Thus the offense is to refuse to bargain collectively with representatives selected by a majority of an appropriate unit.

Sec. 9 (b) provides the Board "shall decide in each case" whether the unit appropriate shall be the employer unit, craft unit, plant unit, or subdivision thereof. Sec. 9 (c) provides that in any question concerning representatives of employees, the Board may investigate and certify the proper representatives, after a hearing upon due notice.

In the instant case the receivership operated an office, a manufacturing plant containing four separate departments, outside warehouses, and outside salesmen. There was no determination by the Board as to an appropriate unit, or whom its majority had selected to represent it until after the acts which were found to constitute an unlawful refusal to bargain. The Board proceeded on the theory that an employer could be guilty of refusing to bargain collectively with the properly selected representatives of the majority of an appropriate unit before any determination

of an appropriate unit, its majority, or that such majority had made the selection.

When the spokesman for the self alleged proper representatives made his demands of the prior receiver, he was told that the receiver did not know the authority of the representatives. The representative of the first receiver told them

> "The law determines who is the sole collective bargaining agency . As to your right, I don't know how many you represent, whether one or all, the law settles that question." (Board's appendix 212.)

The fact that a foreman tried to find out how many of his department belong to the union was claimed to have been the act of the receiver, and evidence of a violation of another provision of the Act.

When this was presented to the Court below for decision, that Court, in its opinion, merely said:

> "We note here that at no time was the refusal to recognize United and bargain with it based upon a lack of a majority of the employees, or upon an absence of a majority in an appropriate unit."

Petitioner insists that if an alleged union wanted to be reccognized as being a majority of an appropriate unit, the burden was on it to establish that fact pursuant to the Act, before anyone could be legally guilty of failing to so recognize it. Certainly the law did not contemplate that an employer's guilt depended on whether he guessed right on what the Board would later determine. Neither does the law contemplate that an employer must formally refuse to negotiate or discuss with alleged representatives because of a lack of majority in order to avoid such a gamble. For these

reasons petitioner submits that this is an important question of federal law which never has been decided by this Court, and which should be so decided.

9.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT EVIDENCE OF EFFORTS BY NON-UNION EMPLOYEES OF A RECEIVERSHIP TO LEARN WHO BELONGED TO THE UNION, CONSTITUTED ANY EVIDENCE OF UNFAIR LABOR PRACTICES, UPON THE PART OF THE RECEIVERSHIP, THE THEN RECEIVER, OR A SUBSEQUENT RECEIVER.

The Circuit Court held that the finding of the Board that the first receiver interfered with, restrained and coerced his employees in violation of Sec. 8 (1) of the Act is supported by evidence that some of the employees of the first receiver interrogated certain employees concerning their union membership (Opinion, P. 4); and gave, as an illustration, the case of an attempt by a foreman to find out which of the employees in his department belonged to the union (Opinion, P. 5, L. 13 to L. 23). There is no evidence that these inquiries were made at the request, or with the knowledge, of either receiver or the receivership court. This testimony was held by the Court to sustain the order entered against the present receiver. Petitioner contends that efforts of employees to find out who belongs to a union is no evidence of an illegal or sinful attitude of mind of the employer, regardless of whether the curious employees are foremen or not; and that this is especially true where there is no showing that the employer directed, authorized, or knew of the inquiry. The gratification of a natural curi-

osity by a foreman is no evidence of the mental attitude or bias of his then employer.

Even if the then receiver had directed the foreman to ascertain which of his department belonged to the union, such action would not be substantial evidence of misconduct on the part of the then receiver. If a union professes to represent a majority of the employees and makes demands on the employer, the fact that the employer seeks to verify the claims is not evidence of an unlawful attitude toward the union.

In effect, the opinion in this case holds that a refusal to bargain with a union claiming a majority is a violation, and that any effort to verify their claim before bargaining is also evidence of a violation. On the other hand, if the claim of a majority had been false, and the employer had not verified it but had bargained with them, to the exclusion of an actual majority, he would have also violated the Act. Petitioner insists that this is an unreasonable holding on an important question of the general law of evidence and of the application of the Labor Act which should be settled by this Court.

10.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE LABOR BOARD COULD AWARD BACK PAY WITHOUT REINSTATEMENT.

The order of the Board includes awards of back pay to two men, Harold Peters, and William Coffey, to whom the petitioner was not ordered to offer reinstatement (Board's appendix, P. 101). The same order also awards back pay to those whom the petitioner is ordered to offer reinstate-

ment without regard to whether the employee desires reinstatement. The question thus presented was called to the attention of the Court by brief of petitioner, but no recognition of the question appeared in the opinion, although this part of the Board's order was not excepted from the enforcement ordered. The question was again called to the attention of the Court in the petition for rehearing, but this was denied without opinion.

Thus the opinion of the Court enforces an award of back pay without reinstatement. The Ninth Circuit Court of Appeals, in the case of *National Labor Relations Board v. Carlisle Lumber Co.*, reported in 99 F. (2) 533, on page 537 says:

> "While the act permits the Board to reinstate with or without back pay, it does not, I think permit an award of back pay without reinstatement, because the back pay provision is connected with and dependent upon the reinstatement provision."

Clearly the act of the Court in the instant case is in direct conflict with the holding in the *Carlisle Lumber Co.* case, which holding was in conformity with the above quoted excerpt from the opinion. And petitioner further submits that the action of the Court in the instant case constitutes an erroneous decision of this question.

11.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT A VARIANCE IN THE PROPORTION OF UNION TO NON-UNION MEN RE-EMPLOYED BY A RECEIVER WHEN OPERATING ON A LIMITED BASIS AFTER A GENERAL SHUTDOWN ON ORDER OF THE RECEIVERSHIP COURT, COULD BE SUB-

STANTIAL EVIDENCE OF UNLAWFUL DISCRIMINATION BY THE RECEIVER, THE TRUST, OR A SUBSEQUENT RECEIVER, IN THE ABSENCE OF ANY EVIDENCE OF KNOWLEDGE BY THE RECEIVER OF THE UNION AFFILIATION OF THE GREATER PART OF THE EMPLOYEES, AND WITHOUT ANY RECOGNITION OR CONSIDERATION OF THE FACTS OR CIRCUMSTANCES PERTAINING TO ANY INDIVIDUAL OR TO ANY JOB.

The opinion shows that the prior receiver was ordered by his appointing court, on October 11, 1937, to terminate all manufacturing operations, excepting only such as were necessary for the fulfillment of orders or to prevent unusual depreciation (Opinion, P. 4, L. 17 to L. 20). There is no finding, or no evidence, that this order had ever been rescinded or modified, or that the prior receiver ever disobeyed or violated it. Therefore it must be presumed that he complied with it.

The opinion accepts the finding of the Board (although based on hearsay evidence only, and contradicted) that before the court order there were 127 employees of whom 96 were union; and that, on Nov. 1 (or 3) there were 57 employees, of whom 29 were union (Opinion, P. 4, L. 23 to L. 29 and P. 7, L. 5 to L. 14). Thus 67 union members were never re-employed. Of this number 14 were found to have been discriminated against. Thus the failure of the former receiver to re-employ 53 of 67 union men was not charged as a discrimination, nor found to so be. Yet the opinion, after using the totals previously and subsequently employed as evidence of discrimination, states:

> "the disproportionate treatment of union and non-union workers may under certain circumstances be

> very persuasive evidence of discrimination" (Opinion, P. 7).

If the failure to re-employ 53 of the previous union men was not discriminatory, and it must be so presumed, then their inclusion in arriving at any proportions was erroneous. If they be eliminated, both before and after, the highly prejuidical ratio of 76% before and 50.8% after diminishes to 58% before and 50.8% after. This means that if, after the shutdown 2 more union men had been employed in place of 2 non-union, the ratio would have been the same before and after. Petitioner insists that such small differences in proportion prove nothing.

Further, there was no evidence to indicate that the then receiver knew the identity of more than 10 or 15 of the 96 union members. Petitioner insists that these ratios or proportions prove nothing in the absence of knowledge of union affiliation. The Court also states:

> "evidence that the men not reinstated were members of a negotiating committee may be sufficient to support a finding that such employees were discriminated against" (Opinion, P. 7).

Of the 67 union men not reinstated the record only shows that 5 or 6 were members of any negotiating committee. The record was full of direct testimony as to the kinds and types of work performed in this plant, the experience and qualifications of the individual men, and the reasons for any manner of selection for re-employment. In a number of instances the work formerly done by one of the men ordered to be reinstated was being done by a man of more years of experience, in many instances the jobs had never been filled at all.

These facts were disregarded by the Court in its opinion, and given no weight or consideration. Direct and uncontradicted testimony as to facts were disregarded in favor of inferences based on proportions, and on alleged committee activities. Of the 67 union men not employed, 53 were never claimed to have been discriminated against. This could sustain an inference that these 53 should not have been re-employed. It could also sustain an inference that their reinstatement was not asked because they were not officers or committee members. But petitioner contends that no inferences should be permitted to contradict otherwise undisputed direct testimony as to the reason why they were or were not hired. Petitioner recognizes that this alleged error has been poorly presented, but hopes that the difficulty of its presentation will not obscure its importance as a question of federal law in the application of the Labor Act.

The contention of petitioner herein was well stated by the Fifth Circuit Court of Appeals in the case of *National Labor Relations Board v. Riverside Mfg. Co.*, 119 F. (2) 302, on page 307, where was held:

> "If real grounds for discharging him had not been shown, or if he had been discharged for trivial or fanciful reasons, these facts would have supported an inference that he was discharged for union activity, but when the real facts of the discharge appear, these facts are stripped entirely of probative value. For it is settled by the decisions that membership in a union is not a guarantee against discharge, and that when real grounds for dicharge exist, the management may not be prevented, because of union membership, from discharging them."

This is certainly even more apt in its application to a question of re-employment rather than discharge.

12.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT ANY OF THE MEN TO WHOM BACK PAY WAS ORDERED WERE EMPLOYEES OF EITHER RECEIVER OR THE TRUST AT THE TIME IT WAS CHARGED OR FOUND THAT THEY WERE DISCRIMINATED AGAINST.

The Court found that the prior receiver complied with an order of his court to terminate all manufacturing operations except to fill orders or prevent deterioration. That this was done on Oct. 11, 1937. That prior thereto he employed 127 persons. That thereafter 60 of these persons never thereafter worked at the plant (Opinion, P. 4, L. 17 to L. 30). There was no evidence or no finding that the work of any one of these 60 persons had ceased as a consequence of, or in connection with any current labor dispute, or because of any unfair labor practice. (Sec.) (3) Labor Act.) This petitioner contended that these men were not employees of either the then receiver or the trust at the time charged, or at any time after October 11, 1937.

The Court, in disposing of this question, said:

> "This record clearly shows and the Board found that the order of the court did not contemplate a permanent cessation of operation, nor did Woolling so construe the order, as the plant reopened almost immediately" * * * "We conclude that under the facts here there was not a severance of the relation of employer and employee."

This constitutes a holding that all 127 of the prior employees continued to be employees as long as the plant operated at all, unless they obtained other regular and substantially equivalent employment. It constitutes a holding

to the effect that neither the receivership court or the receiver could terminate the employment of any man unless they permanently closed the entire plant.

Petitioner contends this holding does violence to the words of the Act, as well as to its intent. The Act obviously divides employees into two groups: Those working, and those whose work ceased under the conditions heretofore recited. As there is no claim that these 14 men fall in the second class, the Court must be holding that they are "working," although not working, because some others are working. Petitioner submits that this is an important question of construction of the Labor Act, which this Court should consider and correct.

13.

THE CIRCUIT COURT OF APPEALS ERRED IN ORDERING A STATE COURT RECEIVER TO EMPLOY A MAN WHOM THE RECEIVERSHIP COURT HAD ORDERED THE PRIOR RECEIVER TO DISCHARGE AND NEVER RE-EMPLOY.

The receivership court ordered, on October 11, 1937, as follows:

> "And the Court hereby further specifically orders and directs the receiver to discharge and never re-employ any person or persons whom the receiver may find to have been responsible for any damage to property of the Trust by reason of deliberate injury thereto or because of gross negligence in the manufacture thereof." (Board's appendix 221.)

The uncontradicted evidence shows that the then receiver did find that one Holyfield had been responsible for damage to property of the trust because of gross negligence

in the manufacture thereof (Board's appendix 134-136, Respondent's appendix 39).

This situation was entirely ignored by the Court in its opinion, and the present receiver was ordered to reinstate this man and pay him back pay. The Court even goes so far as to include this man in the group whom it finds are still working (Opinion, P. 8, L. 3-4). If this decision stands, this petitioner may be placed in the position of being in contempt of the state court if he obeys the decision, or being in contempt of the federal court if he obeys the receivership court. A clearer case of conflict of jurisdiction would be hard to find, as the state court has never consented to this proceeding, and timely objection was made.

Petitioner contends that the effect of the action of the Circuit Court of Appeals is in violation of the holding of this Court as announced by Justice Brandeis in the case of *American Surety Co. v. Baldwin*, 287 U. S. 156, wherein it is held that:

> "The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal courts." (287 U. S. 166.)

For these reasons petitioner submits that this is a very important question of federal law which has been erroneously decided and should be correctly settled by this Court.

14.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE LABOR BOARD COULD NOT FOR-

FEIT ITS RIGHT TO ENFORCEMENT OF AN ORDER BECAUSE OF LACHES BASED UPON UNREASONABLE AND UNEXPLAINED LAPSE OF TIME BETWEEN THE ACTS COMPLAINED OF AND THE ORDER.

A.

This petitioner presented to the Court below the question of the unreasonable and unexplained lapse of time between the alleged violations, the order, and the petition for enforcement, and contended that it constituted such laches as to bar the relief asked by the Board. The illegal acts are alleged to have occurred on or before November 15, 1937 (Board's appendix 1). The first formal charges were filed with the Board on November 12, 1937 (Respondent's appendix 1). Complaint was issued September 26, 1938 (Board's appendix 7). Hearing began October 6, 1938, and ended on October 12 (Board's appendix 64). The order was issued March 22, 1940 (Board's appendix 102). The petition for enforcement was filed November 8, 1940 (Transcript 1).

Thus it was 28 months after charges were filed before a decision, and 7½ months more until petition for enforcement was filed. There was nothing that either the receiver or the receivership court could have done to have reduced the 28 month delay, except to abandon all of their contentions. There was nothing that this receiver or the receivership court could have done to have reduced the additional 7½ months delay, except to abandon its contentions as to lack of jurisdiction of the person of the receiver or of the trust. During all of this period the amount which might be finally taken from the creditors of this trust to pay men for not working was being constantly enhanced.

Petitioner contended that the Board could not fairly use such a method of delay and enhancement of possible penalties to coerce abandonment of legitimate or factual contentions and that such delay without explanation or excuse, constituted laches. Petitioner insisted that equity would not enjoin a man from doing something he had never done or threatened to do merely because another man had done such things three years before. The opinion of the Court refuses to consider any delay prior to the order (Opinion, P. 8), thus holding that delay between charges and an order, cannot constitute laches. Petitioner submits that this is an important question of federal law, erroneously decided; and that it should be settled by this Court so as to eliminate the possibility of such coercion in the future.

B.

This holding is in direct conflict with the decision of the Second Circuit Court of Appeals in the case of *National Labor Relations Board v. National Casket Co., Inc.*, 107 F. (2) 992. In that case there was a delay of 8 months between the filing of charges and the order, and another 14 months until petition for enforcement. This was 22 months in all. The Court decided:

> "When a complaint involves the granting of affirmative relief against an employer, it is particularly desirable that the case be prosecuted to conclusion with as much expedition as is reasonably practicable, for any unnecessary delay results in obvious hardship to the employer, since the longer the delay the larger the sum he must pay as wages for work never performed, if the order requires reinstatement of employees with back pay."

but further held that it would not apply this holding in that case because the laches "had not been urged" by the employer.

15.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT AN EMPLOYER UNSUCCESSFUL BEFORE THE LABOR BOARD, WHO DENIED THE JURISDICTION OVER HIS PERSON OF EITHER THE BOARD OR AN ENFORCING COURT, MUST ABANDON HIS JURISDICTIONAL CONTENTION OR SUBMIT TO UNLIMITED ENHANCEMENT OF POSSIBLE BACK PAY LIABILITY BECAUSE OF UNREASONABLE DELAY OF THE BOARD IN SEEKING ENFORCEMENT OF ITS ORDER.

The Court, in considering the contention of laches, quoted from one of its own opinions (not then published), and adopted its holding as applicable in the instant case. The effect of the quotation is that an order of the Board is binding from its entry and that, if an employer don't like it he can proceed in court to set it aside; and that he therefore cannot complaint of delay by the Board in seeking enforcement. Of course this is no answer to the delay of 28 months before the entry of the order. Petitioner herein further contends that it is an erroneous decision of law to hold that it is an answer if, as in the instant case, the employer is asserting a lack of jurisdiction of the Board and any circuit court of appeals. It is obvious that an affirmative proceeding by him for review would be an abandonment of his denial of the jurisdiction of the court. Petitioner contends that it is erroneous to hold that a defendant in equity must abandon jurisdictional defenses in order to raise a question of unreasonable delay as a bar to an injunction. It is submitted that this is an erroneous decision of an important question of both federal and general law which should be settled by this Court.

16.

THE CIRCUIT COURT ERRED IN HOLDING THAT THE RECEIVERSHIP WAS ENGAGED IN INTER-STATE COMMERCE WHICH MIGHT BE AFFECTED BY A LABOR DISPUTE AFTER THE RECEIVERSHIP COURT ORDERED THE PLANT SHUT DOWN.

All of the unfair labor practices found to have been committed must have been such as will probably affect the flow of inter-state commerce in order to come under the provisions of the National Labor Relations Act. The record shows that the state court ordered the operations of the plant to be discontinued because of adverse business conditions and not to be reopened at any time except for the purpose of filling actual orders received. (See copy of order in this petition.)

There is no evidence in the record that after the closing of the plant the receivership ever engaged in inter-state commerce. There is no evidence that it purchased logs, and no evidence of any sales or any proportion of sales in interstate commerce. There is no presumption that a receivership will continue to operate in inter-state commerce, and on the other hand the inference to be drawn from the Court's order is that unless business conditions change the receivership may never again operate in inter-state commerce, but may proceed to liquidation.

Thus there is an utter lack of evidence to support the Court's finding that these alleged unfair practices will in any way affect inter-state commerce.

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